DEPARTMENT OF STATE REVENUE

04-20140038.LOF

Letter of Findings Number: 04-20140038
Sales and Use Tax
For Tax Years 2010-12

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective as of its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The company involved in both providing public transportation and in hauling its own property was eligible for the public transportation exemption on some of its purchases and was not eligible for the exemption on other purchases. The protest was sustained regarding the purchase of diesel fuel for trucks predominantly used in public transportation and was denied regarding off-road fuel used in loaders after delivery occurred. Similarly, the protest was denied regarding the purchase of the two loaders themselves.

ISSUE

I. Sales and Use Tax–Exempt Purchases.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-5-27; IC § 6-8.1-5-1; Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Carnahan Grain, Inc. v. Ind. Dep't of State Revenue, 828 N.E.2d 465, 468 (Ind. Tax 2005); Wendt LLP v. Ind. Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax 2012); Ind. Dep't of State Revenue, Gross Income Tax Division v. Klink, 112 N.E.2d 581 (Ind. 1953); 45 IAC 2.2-3-4.

Taxpayer protests proposed assessments for additional use tax.

STATEMENT OF FACTS

Taxpayer is an Indiana retail merchant and service provider servicing the agricultural industry. As the result of a sales tax and use tax audit, the Indiana Department of Revenue ("Department") determined that Taxpayer had under-paid sales tax as a consumer for the tax years 2010, 2011, and 2012. The Department therefore issued proposed assessments for use taxes, along with interest for those years. Taxpayer protests that the sales in question were exempt sales and that the proposed assessments resulting from the imposition of sales tax on that account were incorrect. An administrative hearing was held and this Letter of Findings results. Further facts will be supplied as required.

I. Sales and Use Tax–Exempt Purchases.

DISCUSSION

Taxpayer protests the imposition of use tax on several items it purchased during the tax years 2010, 2011, and 2012. Taxpayer states that the purchases in question were eligible for the public transportation exemption and that no sales or use tax was due. The Department determined that the tangible personal property ("TPP") upon which use tax was imposed was partially used in public transportation and partially in the transportation of Taxpayer's own property. The Department therefore calculated the percentage of exempt use and taxable use, then imposed use tax on the percentage of taxable use. Taxpayer disagrees with the Department's interpretation and methodology in applying the public transportation exemption.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867

N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing. . .[courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, all interpretations of Indiana tax law contained within this decision, as well as the preceding audit, shall be entitled to deference.

Sales tax is imposed by IC § 6-2.5-2-1, which states:

> (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
> (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Use tax is imposed under IC § 6-2.5-3-2(a), which states:

> An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

45 IAC 2.2-3-4 further explains:

> Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

Therefore, when sales tax is not paid when TPP is purchased, use tax will be imposed.

However, IC § 6-2.5-5-27(a) exempts certain TPP transactions:

> Except as provided in subsection (b), transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

The Department agreed that Taxpayer is involved in public transportation for part of its activities. Taxpayer argues that the Department erred in its application of the public transportation exemption provided by IC § 6-2.5-5-27(a). Taxpayer refers to Carnahan Grain, Inc. v. Ind. Dep't of State Revenue, 828 N.E.2d 465, 468 (Ind. Tax 2005), where the court provides:

> In Panhandle, the sole issue before the Court was whether a taxpayer engaged in hauling for both itself and third parties was entitled to a 100[percent] exemption, rather than a partial exemption based on the percentage of predominant use. See Panhandle, 741 N.E.2d at 817. This Court held that the public transportation exemption is an all-or-nothing exemption; therefore, if a taxpayer's property is predominantly used for hauling third-party property, the taxpayer is entitled to a 100[percent] exemption despite the fact that the property is also used for non-exempt purposes.

(Emphasis added).

In its first point of protest, Taxpayer asserts that the diesel fuel it purchased for trucks it predominantly used to transport the property of third parties is exempt from sales and use taxes under IC § 6-2.5-5-27(a) and Carnahan Grain. A review of the audit report shows that the Department determined that Taxpayer used the diesel fuel in those trucks in the course of providing public transportation over fifty percent of the time in each of the tax years at issue. The Department imposed use tax on the remaining percentage for each year.

As provided by the tax court in Carnahan Grain, the public transportation exemption is an all-or-nothing exemption. Since, by the Department's own calculations, Taxpayer used the trucks and the diesel fuel within them to engage in public transportation over fifty percent of the time, the purchase of that diesel fuel used in these trucks is wholly exempt. Taxpayer has met its burden of proving the proposed assessments wrong with regard to the diesel fuel used in its trucks in the course of providing public transportation.

In its second point of protest, Taxpayer argues that two loaders and the off road fuel it purchased for those

loaders were eligible for the public transportation exemption. Taxpayer believes that the loaders and the fuel were used in its public transportation services. Specifically, Taxpayer explains that it hauled the TPP its customers ordered to the agricultural fields. Taxpayer then dumped the materials and used the loaders to put the material into spreaders. Taxpayer believes that the entire process up to the point of loading the materials into the spreaders is part of its public transportation service.

The Department does not agree with this analysis. In Wendt LLP v. Ind. Dep't of State Revenue, 977 N.E.2d 480 (Ind. Tax 2012), the Indiana Tax Court explained that the taxpayer in that case was involved in public transportation but that not every step of the taxpayer's process qualified for the public transportation exemption. Specifically, the court explained that the equipment and materials Wendt used in reassembling its customers' transported goods constituted post public transportation activities. Id. at 487-488.

Similarly, in the instant case, Taxpayer's public transportation activities end when its customers' agricultural materials are dumped on the ground. Taxpayer then provides the subsequent service of loading the agricultural materials into its customers' spreaders. Thus, the loaders and the off road fuel used to operate the loaders are not eligible for the public transportation exemption. Taxpayer has not met the burden of proving the proposed assessments wrong regarding the loaders and the fuel used to load materials into its customers' spreaders.

As an alternate argument, Taxpayer states that its customers purchased the materials exempt and that the fuel and loaders used to load the materials must also be exempt. In support of its position, Taxpayer refers to Ind. Dep't of State Revenue, Gross Income Tax Division v. Klink, 112 N.E.2d 581 (Ind. 1953). In that case, the Indiana Supreme Court concluded that the sales were subject to a lower rate of gross income tax.

The Department does not find Klink supportive of Taxpayer's protest. The tax at issue in Klink was gross income tax. The taxes at issue in the instant case are sales tax and use tax. These taxes were/are founded in entirely different articles of Title Six of the Indiana Code. Also, the gross income tax was repealed beginning in 2003.

In conclusion, Taxpayer has met the burden imposed under IC § 6-8.1-5-1(c) regarding the purchase of diesel fuel for its trucks used in public transportation. Taxpayer has not met the burden imposed under IC § 6-8.1-5-1(c) regarding the two loaders and the off road fuel used in the loaders. The loaders and fuel were used in the provision of loading services after Taxpayer's public transportation services had ended.

FINDING

Taxpayer's protest is sustained in part and denied in part, as described above.

Posted: 06/24/2015 by Legislative Services Agency
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